No. 356 97

In the Supreme Court of the United States

OCTOBER TERM, 1959

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, AND RACHEL M. BRAWNER, PETITIONERS

v.

NEIL H. MCELROY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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v.

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OPINIONS BELOW

The opinion of the district court (R. 132)[1] is not reported. The opinion of the court of appeals *en banc* (Pet. App. 1a–42a) is not yet reported.[2]

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1960 (Pet. 45a). The petition for a writ of certiorari was filed on May 24, 1960. The juris-

[1] "R." refers to the Joint Appendix in the court of appeals which has been filed in this Court.

[2] After the decision of the Court of Appeals was entered, respondent Gates was substituted for respondent McElroy in the capacity of Secretary of Defense. Respondents thereupon moved on May 3, 1960 in the Court of Appeals for dismissal of the case

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the commander of a military installation has authority to prohibit, summarily and without a hearing, entrance of persons employed by private contractors into the installation.

2. Whether the exercise of such authority in the circumstances of this case violated the Fifth Amendment to the Constitution.

STATEMENT

Petitioner Rachel M. Brawner was employed as a short-order cook by the M & M Restaurants, Inc., a private company (hereafter called the "Concessionaire") at a cafeteria on the premises of the United States Naval Gun Factory in Washington, D.C., which is engaged in the development of weapons systems of a highly classified nature (R. 4, 39, 90, 93, 107). The property on which the cafeteria was situated is owned by the United States (R. 105) and is under the command of the Superintendent of the Naval Gun Factory (R. 105; Exhibits C and D, R. 108–112). Access to the Gun Factory is restricted to authorized personnel and is controlled by military guards at all points of access. An identification badge

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as to Mr. McElroy in his individual capacity. See fn. 4, *infra*, p. 6. This motion was granted on June 2, 1960, but because of defective service respondents filed a motion in the Court of Appeals to reconsider and reaffirm the court's order dismissing as to Mr. McElroy in his individual capacity. Petitioners then cross-moved to vacate the order of June 2, suggesting lack of jurisdiction since a petition for certiorari had been filed in this Court. Respondents have filed an opposition to this cross-motion. No further action has yet been taken by the Court of Appeals.

is issued by the Security Officer of the Gun Factory to persons authorized to enter the premises and must be displayed by those seeking entry (R. 7, 90, 94).

The cafeteria was operated by the Concessionaire under a contract with the Board of Governors of the United States Naval Gun Factory Cafeterias (R. 5–6). Under this contract the Concessionaire agreed that it would not continue to engage personnel who "fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity" (R. 5–6). The personnel employed by the Concessionaire were members of the petitioner union, Cafeteria and Restaurant Workers Union, Local 473, AFL–CIO, with whom the Concessionaire had a collective bargaining agreement containing a provision that no worker should be discharged "without good and sufficient cause" and also providing for arbitration proceedings to resolve any disputes arising under the contract (R. 18–20).

When petitioner Brawner began working for the Concessionaire, she was issued an identification badge which permitted her to enter and leave the confines of the Gun Factory. On November 15, 1956, at the direction of respondent Lieutenant Commander Williams, the Security Officer of the Gun Factory, petitioner Brawner was required to relinquish her identification badge because of failure to meet the security requirements of the installation (R. 98–99). This action was subsequently upheld by respondent Tyree, Superintendent of the Naval Gun Factory (R. 59–60). As the basis of his action, Tyree cited the provision in the contract, entered into between the

naval officials and the Concessionaire, that the Concessionaire could employ only personnel who met the security requirements for admittance into the Factory as determined by the Security Officer (Exhibit N, R. 32–33). As a consequence of the withdrawal of her identification badge, petitioner Brawner has not since been permitted access to the premises where the cafeteria is located.

Shortly after the termination of Mrs. Brawner's access to the Gun Factory, Denver E. McKaye, president of the Concessionaire, notified the Business Agent of the Union that his firm would employ petitioner Brawner at another location where his firm operated a food service establishment, *i.e.*, the Skylark Motel, Springfield, Virginia (R. 131). Mr. Palmer, the Union Business Agent, told Mr. McKaye that the location of this alternate employment was unsatisfactory and therefore refused the offer for petitioner Brawner (R. 131). The Union took the position that the Concessionaire had discharged petitioner Brawner "without good and sufficient cause" and thereby had violated the collective bargaining agreement between the Concessionaire and the Union (R. 8–9, 20–23, 45–48, 91). Accordingly, the Union demanded arbitration proceedings under the contract. An arbitration hearing was held, and on August 6, 1957, the arbitration panel held that petitioner Brawner was not discharged by the Concessionaire. The panel further held that *if* she was discharged it was not the fault of the Concessionaire, but was the result of the government's action in denying access to the place of employment which made it impossible

for the employer to perform his contract with the Union (R. 71, 76).

On September 6, 1957, the petitioners instituted suit in the District Court for the District of Columbia seeking (1) to require the respondents[1] to furnish petitioner Brawner with an identification badge authorizing her entry upon the premises of the Naval Gun Factory and approval of her reemployment there by the Concessionaire; (2) to require the Concessionaire to reinstate her with all seniority rights, and to pay all loss of salary since November 15, 1956, with interest at 6% per annum; (3) to hold the respondents and the Concessionaire jointly and severally liable as individuals for loss of pay since November 15, 1956, with interest at 6% per annum; and (4) to set aside the arbitration award of August 6, 1957 (R. 16–17). After a hearing, the district court denied the plaintiffs' motion for summary judgment, granted the defendants' cross-motion for summary judgment, and dismissed the complaint as to all the defendants (R. 132). A three-judge division of the court of appeals, in a divided decision, affirmed the judgment in favor of the Concessionaire, but reversed the judgment as to the respondents here and remanded the case. On rehearing *en banc*, the full Court of Appeals held the decision of the three-judge panel erroneous and affirmed the judgment of the district court.

[1] Besides Tyree and Williams, the other respondents are Neil H. McElroy, the former Secretary of Defense, and Thomas S. Gates, the present Secretary of Defense. The Concessionaire was named as a defendant in the complaint but the district court dismissed the action as to it and the court of appeals affirmed. Petitioners do not seek review of these rulings, and the Concessionaire is not a respondent in this Court.

The contract under which the Concessionaire operated the cafeteria where petitioner Brawner was employed expired on January 31, 1958, and the Concessionaire no longer operates any cafeteria on the premises of the Gun Factory. The new concessionaire, Implant Foods, Inc., has entered into a collective bargaining contract with the Union whereby Implant has agreed to employ petitioner Brawner with full rights if this litigation is decided in her favor (Pet. App. 40a).

ARGUMENT

Petitioner Brawner, an employee of a private company with a contract to operate on a military base, was summarily denied access to the base by action of the military commander. Petitioners seek a judicial order requiring the respondent government officials to return Mrs. Brawner's identification badge and thereby allow her access to the military installation.[4] The considered ruling of the court below adverse to their claims is correct, and there is no need for review by this Court.

1. Petitioners' principal contention is that the decision of the court of appeals upholding the action of the military commander is in conflict with *Greene* v.

[4] Petitioners' additional claim for relief against the respondent government officers—that they be held jointly and severally liable for loss of pay—is plainly frivolous. Their action, whether or not authorized, was clearly taken in the performance of their official duties. It was therefore absolutely privileged from civil liability. See, *e.g.*, *Barr* v. *Matteo*, 360 U.S. 564; *Howard* v. *Lyons*, 360 U.S. 593; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949. The other relief sought by petitioners in their complaint is directed to petitioner Brawner's employer, which is not a party in this Court.

McElroy, 360 U.S. 474, in which this Court held that "in the absence of explicit authorization from either the President or Congress the respondents [in that case] were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination" (*id.* at 508). The petition reasons that Mrs. Brawner was likewise deprived of her job with a private employer without confrontation and cross-examination—without even any hearing at all—and that such a procedure was not explicitly authorized. We submit, however, that while the *Greene* case may appear on the surface to involve an analogous situation, it is in fact premised on factors which are not present in the instant case. Moreover, even if the *Greene* principle is thought applicable, the relevant statutes and regulations, coupled with the long history of plenary control by military commanders over access to military installations through summary decisions, constitute the clear authorization which would be required.

a. The decision of this Court in *Greene* was founded on three basic propositions, none of which is involved in this case.

(*i*). First, in *Greene*, the evidence was uncontradicted that the employee had lost his job as a result of the revocation of his security clearance and that he was unable to obtain a new position in the aeronautics field. Thus, he was forced to leave a job paying $18,000 per year and to accept a position paying $4,700. In the light of these facts, the Court stated that "the issue, as we see it, is whether the Depart-

ment of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions * * *" in proceedings in which confrontation and cross-examinations are not guaranteed. 360 U.S. at 493. Similarly, the opinion later describes the situation before the Court as "Governmental action [which] seriously injures an individual * * * (*id.* at 496), "an industrial security program which can operate to injure individuals substantially by denying to them the opportunity to follow chosen private professions * * *" (*id.* at 500), "security programs whereby persons are deprived of their present civilian employment and of the opportunity of continued activity in their chosen professions * * *" (*id.* at 502), "programs under which persons may be seriously restrained in their employment opportunities * * *" (*id.* at 502–503), "substantial restraints on employment opportunities of numerous persons * * *" (*id.* at 506), and a program by which "a person may be deprived of the right to follow his chosen profession" (*id.* at 507). And, in concluding, the Court reiterated that "the petitioner's work opportunities have been severely limited * * *" and that "respondents were not empowered to deprive petitioner of his job * * *" (*id.* at 508). In sum, the Court relied heavily on the important interest of employees such as Greene in earning a satisfactory livelihood.

The situation in Mrs. Brawner's case is quite different. In the first place, since the M & M company no longer has a contract to operate a cafeteria at the

Gun Factory, the present posture of the case is that the return of Mrs. Brawner's badge could not possibly restore her job with M & M.[5] While petitioner Union has a collective bargaining agreement with the new concessionaire to hire her if her badge is returned, she is in effect now in the position of a person seeking access to the base in order to assume *new* employment. In other words, as the case comes before this Court, Mrs. Brawner, far from seeking access to the base in order to protect an old job, is attempting to secure new employment with a new employer.[6]

Even if the case is considered in its posture before the district court, Mrs. Brawner cannot claim that her relationship with her employer was entirely severed, let alone that she was denied all employment in her chosen occupation. She was told by the Concessionaire that she could no longer work at the particular

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[5] The present relationship of the M & M company to the Gun Factory is important because the main relief requested by petitioners is the restoration of Mrs. Brawner's badge (as an employee of the company) at the Gun Factory. That relief is necessarily prospective.

[6] Recent events also suggest that this case, as it relates to restoration of Mrs. Brawner's badge, may soon be moot, or, at least, of greatly diminished importance insofar as Mrs. Brawner is concerned. The Defense Department has announced that the Gun Factory will no longer operate as an industrial plant (although it will remain a naval installation), thereby causing a gradual reduction in the civilians employed from 5970 at present to 2300 in January 1962. The number of workers in the cafeteria will be reduced proportionally as employees in the Gun Factory are discharged. Thus it is contemplated that by January 1962 over one quarter of the cafeteria workers will no longer be needed. Since it is estimated that Mrs. Brawner is among the lower quarter of the cafeteria's employees in seniority, she would presumably lose her position at the Gun Factory in the near future even if a badge were given her.

cafeteria in the Gun Factory, but she was also offered employment in another cafeteria operated by her employer not too many miles away. The denial of access to Mrs. Brawner meant, in reality, a transfer of positions within the same company and not necessarily the loss of all employment.[7] Her refusal to accept the transfer because of inconvenience does not measure up to the drastic interference with employment, and employment opportunities, involved in *Greene*. In addition, it is significant that Mrs. Brawner, unlike Greene, was in an occupation in which few positions involve government clearance of any kind. She was not deprived generally of her right to employment, as the Court held Greene to have been.

Turning from petitioner Brawner in particular to the problem as a whole, it is evident that there is substantially less likelihood of a serious impact on employment opportunities through loss of access to military installations. The number of civilians employed on military bases by private contractors, while large, is a negligible proportion both of total employment and of employment in the particular occupations involved. The large majority of such persons are in non-specialized service occupations[8]—laundrymen,

[7] Compare the concurring opinion of Mr. Justice Douglas in *Peters* v. *Hobby*, 349 U.S. 331, 352: "If the sources of information need protection, they should be kept secret." This statement implies that a government employee could be transferred, so that he could not see classified information, in circumstances where the information could not be used to discharge him.

[8] The major exceptions are employees who, unlike petitioner, have access to classified information. They, however, generally come within the Industrial Security Program to which the *Greene* case applied (see Pet. 15).

milk truck drivers, cafeteria workers, and the like—as to which most employment within the United States is totally unconnected with the government. Thus, even when denial of access to a military base actually results in an employee's loss of his job, it is unlikely to result in barring him, as in *Greene,* from his occupation as a whole.

(*ii*). The second fundamental premise of the *Greene* decision is that, under the Industrial Security Program, clearance is denied only on the basis of a fact determination reached through elaborate hearing and appeal procedures. The Court stated that it is a general principle of American jurisprudence that "where governmental action seriously injures an individual, *and the reasonableness of the action depends on fact findings,* the evidence used to prove the Government's case must be disclosed to the individual so that he has the opportunity to show that it is untrue." 360 U.S. at 496 (emphasis added); see also *id.* at 495, 508. Thus, the Court concluded that the requirement of fact findings assumes that the usual incidents and protections of American law will be afforded in reaching these findings, unless there is explicit provision to the contrary.

Military commanders have throughout our history *summarily* controlled access to military installations. See, *e.g.*, 26 Op. Atty. Gen. 91, 92 (1906).* This has not been done on the basis of "fact findings" or,

* In fact, the Army Judge Advocates General repeatedly held that the Secretary of War lacked even the authority to allow use of military lands by private citizens unless the use was revocable at will. See Winthrop, *Digest of Opinions of the Judge Advocates General of the Army* (1895), 625–626.

normally, of a hearing-type or trial-type of procedure. Military commanders have made their decisions simply on the basis of whatever information they had or could obtain. Since these decisions have not been based on a "fact finding" in any real sense, there is no ground for assuming here—as in *Greene*—that the normal procedural concomitants of factual findings must be accorded the individual adversely affected (in the absence of clear authorization by the President or Congress of a different procedure).

(*iii*). Another critical distinction between this case and *Greene* is that here no serious constitutional issue is involved. It is clear that the ruling in *Greene* rests in considerable measure on the conclusion that the "administrative action has raised serious constitutional problems" and that for this reason the Court will not lightly assume that the action was authorized. 360 U.S. at 507; see also *id.* at 492, 497, 508. In contrast, as we indicate below (pp. 13–17), the long history of summary control over civilian access to military bases makes clear that petitioners have no constitutional right to a trial-type adjudication before access is denied. Civilians have been, and can validly be, excluded from military posts without any hearing or trial—and for a large and varied number of reasons. But even if a serious constitutional issue were involved here, we do not believe that this fact alone, in the absence of at least the other two underlying premises of the *Greene* decision we have discussed, would be enough to bring this case close to *Greene*.

b. In short, there do not exist in this case basic factors upon which the Court relied in *Greene* in im-

posing an unusually strict standard (see 360 U.S. at 506) for finding authorization by the President or Congress of the procedures followed. If ordinary standards are applied, authorization for a summary procedure is clear. But even if the *Greene* principle does apply and the clearest authorization must be shown, we submit that this criterion has been satisfied.

Congress has provided that the Secretary of the Navy has complete custody and charge of all property of the Navy Department (10 U.S.C. 5031(c)) and that he has the authority to issue regulations for the custody, use, and preservation of this property (5 U.S.C. 22; 10 U.S.C. 6011). Regulations promulgated by the Secretary, and specifically approved by the President, state that "[t]he responsibility of the commanding officer for his command is absolute," and that "dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer * * *." Navy Regulations (1948), Articles 0701, 0734.[10] Moreover, the regulations give the Chief of Naval Operations authority to issue supplementary directives including a Security Manual (*id.* Article 1502). These directives similarly give the commanding officer of an activity "full discretion" over the entrance of personnel of private contractors; declare that the commanding officer "alone remains responsible for the overall security of his command"; and provide that the ordinary administration of the security system within the activity is

[10] Section 3 of the Administrative Procedure Act (5 U.S.C. 1002) provides that such regulations "relating solely to the internal management of an agency" need not be published in the Federal Register.

normally delegated to the Security Officer. Navy Security Manual for Classified Matter, October 2, 1954, Sections 1403, 1409; Navy Physical Security Manual, April 14, 1956, Sections 0154, 0156.

These statutes, regulations, and manuals give complete authority to the commanding officer to decide security matters in general and, more particularly, give him full power to select or screen those persons who shall have access to the installation. This authorization is confirmed by the actual practice of military commanders throughout our history; they have regularly exercised authority to admit or exclude civilians selectively, as they deemed appropriate at the time.[11] Indeed, it appears that until this litigation it has never even been seriously suggested that military commanders lacked authority summarily to exclude persons seeking to enter their commands.

2. Petitioners also contend (Pet. 22–23) that, if respondents' procedure was authorized, it violated (as applied here) the Fifth Amendment.[12] This claim, however, arises in the most difficult context for sustaining the right to employment against alleged fed-

[11] On the other hand, in *Greene*, the Court noted that, prior to World War II, only "sporadic efforts were made to control the clearance of persons who worked in private establishments which manufactured materials for national defense." 360 U.S. at 493.

[12] Petitioners claim that the First Amendment also was violated. Certainly, the naval commander here could have withdrawn petitioner Brawner's badge for security reasons after a full trial-type hearing even though freedom of speech, the press, and association might to some extent be indirectly affected. The only issue then is whether such procedures are required by the due process clause of the Fifth Amendment.

interference which has yet come before this rt. In *Bailey* v. *Richardson*, 341 U.S. 918, the rt affirmed by an equal division a court of ap-'s decision upholding the constitutionality of the e. l Employees Loyalty Program. That program ctly deprived the employee of his employment on basis of a finding relating to his loyalty and after rings in which he did not have the opportunity confront adverse witnesses.[13] In the *Greene* case, Court found it unnecessary to pass on the constitu-ality of the Industrial Personnel Security Pro-m. By denying clearance, the latter program may many instances (as in *Greene*) cause the loss of loyment with a private company operating on its l property, and in some instances the drastic cur-ment of all employment opportunities. On the er hand, the circumstances of the instant case sent a stronger governmental interest, coupled h an interest of the employee which is significantly than in *Bailey* or *Greene*.

The government has absolute control over property the United States and under this power may ex-le the public from such property even when this ses pecuniary damage. See *Utah Power and Light* v. *United States*, 243 U.S. 389; *United States* v. *lwest Oil Co.*, 236 U.S. 459; *Light* v. *United States*, U.S. 523; *Camfield* v. *United States*, 167 U.S. 518. addition, here the governmental property is a mili-y installation. The need of military commanders

[13] And see *Vitarelli* v. *Seaton*, 359 U.S. 535, 539, where the rt suggested that a government employee not protected by ute or regulation could be summarily discharged.

for absolute control over access to their installations is especially clear; and this control has been exercised without substantial question throughout our history. Commanding officers, in allowing petitioner Brawner and other employees of private contractors into military installations, convey no right of access in derogation of their absolute control. Rather, these employees are merely granted permission, subject to the ordinary prerogatives of the commanding officer, to enter the base for the convenience and benefit of the United States. In this case, these overriding prerogatives were embodied in the contract of the Board of Governors of the cafeteria with the Concessionaire, by the provision preventing the Concessionaire from employing in the Gun Factory any employees not meeting the Naval installation's security requirements or other regulations of the Security Officer (R. 6). The Union's collective bargaining agreement and Mrs. Brawner's employment with the Concessionaire were subject to this contract with the employer.

In comparison to the obvious interest and long history of absolute government control over access by civilians to military installations, the interest of Mrs. Brawner and other persons similarly situated is far outweighed. Unlike the employees in the *Bailey* and *Greene* cases, petitioner Brawner's relationship with her employer was not severed. Instead, she was offered a transfer to another position with the same company some miles away. And, as we have shown (pp. 9–11), even in situations where the employee does in fact lose his job entirely, it would be rare indeed when comparable positions in the same occupation

were not readily available. Finally, on this record Mrs. Brawner has not been accused of being in any way disloyal. The military commander revoked the badge "for security reasons" (R. 41, 99)—which includes a multitude of different reasons relating to possible interference with the military mission of the base, including being accident-prone [14]—and the Concessionaire offered to transfer her because she could no longer be employed on the base under its contract. No "stigma" of disloyalty in any meaningful sense has been placed upon her. In sum, her interests in a trial-type adjudication fail significantly when measured against the government's overriding interests in controlling its military posts, and against the established history of that control.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[14] See Naval Physical Security Manual, April 14, 1956, Section 0250, 0260–0261.

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